

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

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|---------------------------|---|----------------------------|
| HSD CORPORATION, an Idaho |) | |
| corporation, |) | No. CV-05-286-CI |
| |) | |
| Plaintiff, |) | ORDER GRANTING DEFENDANT'S |
| |) | MOTION TO CHANGE VENUE AND |
| v. |) | DIRECTING TRANSFER TO THE |
| |) | NORTHERN DISTRICT OF |
| KLA-TENCOR CORPORATION, a |) | CALIFORNIA |
| Delaware corporation, |) | |
| |) | |
| Defendant. |) | |

BEFORE THE COURT is Defendant's Motion to Change Venue (Ct. Rec. 21), noted for hearing without oral argument on April 10, 2006. Attorney Scott C. Cifrese, of Paine, Hamblen, Coffin, Brooke & Miller, LLP, represents Plaintiff; attorney James E. Reed, Winston & Cashatt, represents Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 17.)

Defendant moves for a transfer of venue of this action to the United States District Court for the Northern District of California, contending there is a contractual agreement between the parties as to choice of the California forum and the convenience of witnesses supports transfer. Plaintiff objects, arguing the choice of forum was not a contractual term negotiated by the parties and

1 that convenience is found equally in the California and Washington
2 courts.

3 **CLAIMS**

4 Plaintiff, a supplier of custom pneumatic servovalves, filed a
5 Complaint for damages against Defendant, a purchaser of such valves,
6 alleging intentional interference with a prospective business
7 advantage, tortious interference (Plaintiff's purchase contract with
8 supplier, Moog, Inc., of New York), breach of contract (purchase
9 orders between Plaintiff and Defendant), breach of contract (non-
10 disclosure agreement between Plaintiff and Defendant) and
11 misappropriation of trade secrets.¹ (Ct. Rec. 1.) Plaintiff,
12 pursuant to diversity jurisdiction under 28 U.S.C. § 1332, alleged
13 jurisdiction over Defendant was appropriate because Defendant had
14 engaged in business activities in this district that were continuous
15 and systematic and the claims arose from those activities. (Ct.
16 Rec. 1, ¶ 5.) Specifically, Plaintiff alleged Defendant transacted
17 business in Spokane County, transacted business in Spokane County at
18 the time the cause of action arose, and/or Defendant's registered
19 agent resides in Spokane County. (Ct. Rec. 1, ¶ 7.)

20 It does not appear Defendant is challenging the jurisdictional
21 basis of Plaintiff's Complaint. (Ct. Rec. 22 at 5.) Rather, it
22 appears the Motion is one for transfer pursuant to 28 U.S.C. §
23 1404(a).

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25 ¹Plaintiff alleges in his argument he is pursuing seven claims
26 against Defendant, but there are only five substantive claims
27 alleged in the Complaint. (Ct. Rec. 1.)
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VENUE - § 1391

A court exercises personal jurisdiction over a party under the law of the forum state, subject to the requirements of constitutional due process. See FED. R. CIV. P. 4(k)(1)(A); *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1320 (9th Cir. 1998). Venue requirements are set forth in 28 U.S.C. § 1391, as amended in 1990. The relevant section notes:

A civil action **wherein jurisdiction is founded only on diversity of citizenship** may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred . . . or (3) a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.

28 U.S.C. § 1391(a) (emphasis added). Residence of a corporate defendant is defined in 28 U.S.C. § 1391(c): "[A] defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced." Under the amended statute, it is possible for venue to be proper in more than one judicial district. *Jenkins Brick Co. v. Bremer*, 321 F.3d 1366, 1371 (11th Cir. 2003). If the parties have not engaged in extensive discovery or an evidentiary hearing on the matter of jurisdiction, the plaintiff need only make a prima facie showing that personal jurisdiction exists over the defendant. *Dole Food Co. v. Watts*, 303 F.3d 1104, 1108 (9th Cir. 2002). Thus, although KLA-Tencor is a Delaware corporation with headquarters located in San Jose, California, there is no dispute it has engaged in a continuing business relationship with Plaintiff, a Washington

1 corporation. Additionally, Defendant has not denied it has a
2 registered agent in the State of Washington. Because Defendant has
3 not challenged the exercise of long-arm jurisdiction under
4 Washington state law, venue is appropriate in the Eastern District
5 of Washington under 28 U.S.C. § 1391(a)(1) and (c).

6 **TRANSFER - § 1404²**

7 Section 1404(a) of 28 U.S.C. provides "for the convenience of
8 parties and witnesses, in the interest of justice, a district court
9 may transfer any civil action to any other district or division
10 where it might have been brought." The decision to transfer lies
11 within the discretion of the trial court. *Shutte v. Armco Steel*
12 *Corp.*, 431 F.2d 22, 25 (3d Cir. 1970). There is, however, a strong
13 presumption in favor of the plaintiff's choice of forum. *Id.* ("[A]
14 plaintiff's choice of a proper forum is a paramount consideration in
15 any determination of a transfer request, and that choice 'should not
16 be lightly disturbed.'" (Citation omitted.)

17 Under § 1404(a), the district court has discretion "to
18 adjudicate motions for transfer according to an 'individualized,
19 case-by-case consideration of convenience and fairness.'" *Stewart*
20 *Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988). A motion

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22 ²A district court ordinarily applies the choice-of-law rules of
23 the forum state. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 243 n.8,
24 (1981). However, when a case is transferred from another state's
25 federal court, the choice-of-law provisions of the originating state
26 govern. *Id.*; *Consul Ltd. v. Solide Enters., Inc.*, 802 F.2d 1143,
27 1146 (9th Cir. 1986).
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1 to transfer requires the court to weigh multiple factors in its
2 determination whether transfer is appropriate. *Id.* Those factors
3 include:

4 (1) the location where the relevant agreements were
5 negotiated and executed, (2) the state that is most
6 familiar with the governing law, (3) the plaintiff's
7 choice of forum, (4) the respective parties' contacts with
8 the forum, (5) the contacts relating to the plaintiff's
9 cause of action in the chosen forum, (6) the differences
10 in the costs of litigation in the two forums, (7) the
11 availability of compulsory process to compel attendance of
12 unwilling non-party witnesses, and (8) the ease of access
13 to sources of proof.

14 *Stewart*, at 49-51; *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498
15 (9th Cir. 2000), *cert. denied*, 531 U.S. 928 (2000). Additionally,
16 the presence of a forum selection clause is a "significant factor"
17 in the court's § 1404(a) analysis. *Stewart*, 487 U.S. at 29. Such
18 a clause, however, is not dispositive. *Id.* at 31. Defendant has
19 the burden of "establish[ing] that a balancing of proper interests
20 weigh[s] in favor of the transfer." *Shutte v. ARMCO Steel Corp.*,
21 431 F.2d. 22, 25 (3rd Cir. 1970).

22 1. Jurisdiction in the Northern District of California

23 Here, Plaintiff does not argue the claims could not have been
24 brought in the Northern District of California and based on the
25 pleadings, there is a factual basis for jurisdiction in that
26 district. Defendant's headquarters are in San Jose, California, and
27 Plaintiff has a corporate facility in Sacramento, California.
28 Moreover, the goods at issue were modified, tested, sold, and
delivered within the Northern District of California. (Ct. Rec. 23,
Carroll Aff.) Thus, jurisdiction and venue also lie in the Northern
District of California under 28 U.S.C. 1391(a) and (c).

1 2. Convenience of the Parties and Witnesses

2 Defendant avers all of its witnesses in defense of the claims
3 raised and in support of its counterclaim (Thomas Kennedy, Bill
4 Buglewica, Sean Carroll, Bill Bengeler, attorney Kevin McAndrews,
5 Mitch Zucker) reside in the Northern District of California. (Ct.
6 Rec. 23, Carroll Aff.) Moreover, dealings with Plaintiff were
7 limited to contact with HSD employee Andy Freudland, who resides in
8 Northern California, and Mark Jenks of Spokane. The dealings with
9 Mr. Jenks were either by phone or during his visits to Northern
10 California. Defendant also asserts there was no personal contact
11 with Mr. Jenks in Eastern Washington by any KLA employee and
12 Defendant has no physical presence or employees residing in Eastern
13 Washington. (Ct. Rec. 23, Carroll Aff.) Additionally, the
14 procedures and equipment used by Plaintiff to test and/or modify the
15 valves is located at Plaintiff's facility in Sacramento, California.
16 Purchase orders and paperwork between Plaintiff and Defendant was
17 sent by Defendant to the Sacramento facility only.

18 Plaintiff does not identify potential witnesses who would be
19 inconvenienced by a transfer of the litigation to the Northern
20 District of California. (Ct. Rec. 26, Jenks Decl.) Moreover, any
21 witnesses called by either party based in New York (employees of
22 Moog) would be equally inconvenienced by travel either to California
23 or Washington. Based on the representations of the parties, this
24 factor weighs in favor of transfer to the Northern District of
25 California.

26 3. Location Where the Agreements Were Negotiated and Executed

27 Plaintiff avers all negotiations for the sale of the valves to
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1 Defendant were oral. (Ct. Rec. 26, Jenks Decl.) Defendant
2 represents the negotiations were by telephone and the written
3 purchase orders were sent to Plaintiff's Sacramento facility.
4 Additionally, the evidence relevant to the intentional interference
5 claim is found in Northern California and New York. Thus, this
6 factor weighs in favor of transfer.

7 4. The State Most Familiar with the Governing Law

8 Defendant argues the choice of law (California) was
9 contractually agreed by the parties. Plaintiff, however, disputes
10 any negotiation occurred with respect to terms related to choice of
11 law or forum. Even assuming such choice of law terms would control,
12 Plaintiff contends the use of California law, under the language in
13 the choice of law provision, is limited to a single claim involving
14 interpretation of the Non-Disclosure agreement as it was arguably
15 "entered into and to be performed entirely within California between
16 California residents." (Ct. Rec. 27 at 7; Ct. Rec. 23, Carroll Aff.
17 ¶ 19, Ex. B.) It is assumed, for purposes of this Order, the choice
18 of law provision would affect only one claim, if at all.

19 Although the first two claims, intentional interference with a
20 prospective business advantage and tortious interference, arguably
21 would be governed by Washington law, the next two claims, breach of
22 purchase orders and non-disclosure agreement, would be governed by
23 UCC-2 (equally familiar to the California court) and California law
24 (if the choice of law provision is enforced). The fifth claim
25 alleges a violation of a trade secret under R.C.W. 19.108. The
26 court concludes, for purposes of the § 1404 analysis, that the
27 choice of law factor would not favor transfer to the Northern
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1 District of California.

2 5. Plaintiff's Choice of Forum and Contacts Relating to the Cause
3 of Action in the Chosen Forum

4 Plaintiff has not provided facts to support his objection to
5 transfer based on this factor, other than his representation that
6 his corporation has its headquarters in the Eastern District of
7 Washington. A plaintiff's choice of forum is given "much less
8 weight" when the forum lacks any significant contact with the
9 activities alleged in the complaint. *PRG-Schultz USA, Inc., v.*
10 *Gottschalks, Inc.*, ___ F.3d ___, No. C-05-2811-MMC (N.D. Calif.,
11 October 17, 2005). It is undisputed the contacts involved in the
12 transactions took place in California with the exception of
13 telephonic contact between the parties, one of whom was located here
14 in the Eastern District of Washington. Thus, little deference is
15 accorded to Plaintiff's choice of forum and the extensive contacts
16 in California would favor transfer. *Id.*

17 6. The Respective Parties' Contact with the Eastern District of
18 Washington

19 Plaintiff does not challenge Defendant's factual assertions
20 that the modification, testing, sale, and delivery to Defendant of
21 the valves took place in Northern California. Additionally,
22 Plaintiff has a corporate facility in that district. There are no
23 contacts identified with the Eastern District of Washington other
24 than Plaintiff's corporate headquarters. Thus, this factor weighs
25 in favor of transfer.

26 7. The Difference in Costs of Litigation

27 The parties have not addressed this factor in detail.
28 Plaintiff argues without factual support air travel is convenient

1 and that technology used by the federal courts and the parties makes
2 geographical distances inconsequential. Generally, litigation costs
3 are reduced when venue is located near most of the witnesses
4 expected to testify or be deposed. Here, all witnesses, save one,
5 reside in Northern California. Accordingly, this factor favors
6 transfer.

7 8. The Availability of Compulsory Process of Non-Party Witnesses

8 Plaintiff has not argued if transfer occurred, he would be
9 unable to compel the testimony of non-party witnesses. Defendant
10 has identified non-party witnesses, all residing within the Northern
11 District of California. The California witnesses are outside the
12 subpoena power of the Eastern District of Washington. FED. R. CIV.
13 P. 45. Thus, this factor favors transfer.

14 9. Ease of Access to Sources of Proof

15 Plaintiff has not identified specific sources of proof to be
16 found in the Eastern District of Washington or that records in this
17 district would be difficult to transport. Defendant has identified
18 evidence located only in the Northern District of California--
19 location of the goods and Plaintiff's facility that received,
20 tested, modified, sold and delivered the goods. Thus, this factor
21 weighs in favor of transfer.

22 **CONCLUSION**

23 The parties have not identified administrative difficulties
24 that could occur such as court congestion should this matter be
25 transferred to the Northern District of California. Here, the only
26 factor that weighs in favor of retaining the action in the Eastern
27 District of Washington is the choice of law with respect to, at
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1 most, four of the five claims. However, should the trial court
2 conclude the choice of law provision is binding on the parties, that
3 factor would no longer favor the Eastern District of Washington.
4 Based on the extensive contacts identified in the Northern District
5 of California, the court concludes, without ruling definitively on
6 the choice of law issue, relevant factors weigh in favor of
7 transfer. Accordingly,

8 **IT IS ORDERED:**

9 1. Defendant's Motion to Transfer (Ct. Rec. 21) is **GRANTED**.

10 2. The District Court Executive is directed to file this
11 Order and provide copies to counsel for Plaintiff and Defendant.
12 The captioned matter shall be **TRANSFERRED** to the United States
13 District Court for the Northern District of California.

14 DATED April 18, 2006.

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16 S/ CYNTHIA IMBROGNO
17 UNITED STATES MAGISTRATE JUDGE
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